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In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

A. The Attorney General's Interpretation Of The Serious Nonpolitical Crime Exception Merits Substantial Deference

1. Respondent and his amici do not dispute that the statutory phrase at issue in this case—"serious nonpolitical crime"—is ambiguous. Indeed, the court of appeals' ruling and respondent's argument labor to pour their own meaning into the phrase. The question, then, is quite simple: to whom has Congress assigned the responsibility for construing an ambiguous statutory provision governing immigration and international affairs that is couched in terms of what the "Attorney General determines"—the Attorney General or the courts? As we explain in our opening brief (Br. 19-22), the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, itself clearly answers that question by requiring deference to the Attorney General. 8 U.S.C. 1103(a) (the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). This Court's decisions provide the same answer. See Gov't Br. 19-22, 39.

The fact that this case arises against the backdrop of the United Nations Protocol Relating to the Status of Refugees (Protocol), Jan. 31, 1967, 19 U.S.T. 6224, and the incorporated provisions of the United Nations Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259, does not diminish the deference owed the Attorney General. "[T]he meaning attributed to treaty provisions by the Government agencies charged with their * * * enforcement is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999).

2. Respondent's argument (Br. 23-25) that no deference is due because the Attorney General has been inconsistent in her interpretation of the serious nonpolitical crime exception is devoid of merit. In *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (BIA 1985), the Board of Immigration Appeals (Board) specifically "reject[ed] any interpretation of the phrases 'particularly serious crime' and 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution." *Id.* at 209. That ruling was not "dictum" (Resp. Br. 20), even if we assume, arguendo, that such a characterization has relevance in the administrative context. The Board found it "necessary" to reach the question. 19 I. & N. Dec. at 209 n.2. And the Eleventh Circuit had no trouble recognizing the ruling as a definitive and "sufficiently authoritative" (Resp. Br. 21) expression of the Attorney General's position. See *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1487 n.10 (1985), cert. denied, 475 U.S. 1022 (1986). The two cases respondent cites (Br. 18-19) as reflecting a contrary position in fact did not resolve the question, and they were decided five years before *Rodriguez-Coto*.[1]

[1] See *In re Ballester-Garcia*, 17 I. & N. Dec. 592, 596 (BIA 1980) (outcome the same whether balancing test or "traditional view" is applied); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 469 (BIA 1980) (outcome the same "whether we apply a balancing test or make our determination based solely on the nature of the offense involved"). Respondent's citation (Br. 21) of *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), and *In re Izatula*, 20 I. & N. Dec. 149 (BIA 1990), is even further afield. Neither case concerned the statutory provision at issue here, addressed the question of whether the risk of persecution should be rebalanced, or involved violence directed solely against innocent civilians.

Equally inapposite is the reliance by respondent (Br. 23-24) and amicus United Nations High Commissioner for Refugees (UNHCR) (Br. 22-23) on the prior practice of the Immigration and Naturalization Service (INS) and the Board of treating an alien's commission of a serious nonpolitical crime as a factor to be taken into account in deciding whether to grant asylum under 8 U.S.C. 1158(a) (1994) as a matter of discretion. See, *e.g.*, 53 Fed. Reg. 11,301-11,302 (1988) (eliminating earlier regulatory provision, 8 C.F.R. 208.8(f)(v) (1981), that mandated denial of asylum on that ground). The post-1988 asylum practice reflected the fact that, before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the INA contained no prohibition against granting asylum to an alien who the Attorney General had serious reasons for believing had committed a serious nonpolitical crime before coming to the United States. As a result, the Attorney General was free to weigh the alien's risk of persecution in the manner recommended by the UNHCR in deciding whether to grant asylum, even though she could not do so with respect to the statutory bar to withholding of deportation. See 53 Fed. Reg. at 11,302 (explaining distinction).[2]

3. Finally, respondent's claim that the content of the Board's decision disentitles it to deference is baseless. It is true (Resp. Br. 22) that the Board in this case did not

[2] Section 604 of IIRIRA, 110 Stat. 3009-690, created a parallel statutory bar to eligibility for asylum as well, which applies to applications filed on or after April 1, 1997. See Gov't Br. 5 n.2.

reiterate its previous refusal to rebalance the persecution risk; but it was unnecessary to do so because *Rodriguez-Coto*, *supra*, had already answered that question. In any event, respondent is ill-positioned to offer up both that complaint and his criticism of the Board (Br. 22, 25-28) for failing to set forth its reasoning at greater length, because respondent never filed a brief with the Board or in any other way presented his current factual or legal theories for relief to the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21. The deference due the Board does not turn upon the Board's ability to divine and address arguments that were never presented to it, but that might be made for the first time in the court of appeals or this Court.

Respondent's further argument (Br. 24-25) that the Board's disagreement with the immigration judge (IJ) diminishes the deference owed is wrong. There is only one final determination by the Attorney General under review in this case, which is the Board's ruling.[3] It is true that the Board generally accords deference to the IJ's credibility findings; but the IJ's credibility findings had no bearing on the Board's ruling here because the Board simply applied the law to respondent's own admitted and uncontested statements. See Gov't Br. 42.[4]

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[3] See *Charlesworth* v. *INS*, 966 F.2d 1323, 1325 (9th Cir. 1992); *Martinez-Benitez* v. *INS*, 956 F.2d 1053, 1055 (11th Cir. 1992); cf. *INS* v. *Doherty*, 502 U.S. 314, 327 (1992) (Attorney General's disagreement with Board does not limit his discretion).

[4] Amicus Lawyers Committee for Human Rights (LCHR) mistakenly asserts (Br. 2-3, 8) that the government concedes that respondent has a well-founded fear of persecution. In fact, the Board expressly reserved that issue. See Pet. App. 18a.

B. The Board Reasonably Concluded That The Risk Of Persecution Upon Return Is Not Relevant In Determining Whether An Alien Committed A "Serious Nonpolitical Crime"

1. The court of appeals erred in requiring (Pet. App. 6a-7a) the Board, in deciding whether to withhold deportation, to balance the seriousness of the alien's crime against the risk of persecution he would face upon return. That consideration finds no support in the text or structure of Section 1253(h)(2)(C). See Gov't Br. 22-26. A future risk of persecution has no logical bearing on whether a previously committed crime was either serious or nonpolitical. It is simply an asserted justification for overlooking the offense. Further, Section 1253(h)(1) already weighs the risk of persecution an alien faces in determining his eligibility for withholding of deportation in the first place. Nothing indicates that Congress intended to count the persecution factor twice.[5]

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[5] Respondent notes (Br. 40) that the Board in this case applied the withholding exception without first determining whether respondent faced the requisite risk of persecution. See Pet. App. 18a. That is beside the point. The issue is one of statutory construction, not Board procedure. There is no gainsaying that, to adopt respondent's reading of Section 1253(h)(2)(C), the Court would have to conclude that Congress intended the risk of persecution to be weighed both in determining eligibility for withholding under Section 1253(h)(1), and again in evaluating the applicability of the exceptions under Section 1253(h)(2). Likewise, respondent's observation (Resp. Br. 39-40) that the Board "balances" by inquiring into whether the political aspect of an offense outweighs its common-law character proves nothing. That inquiry is necessary to give meaning to the ambiguous statutory term "serious nonpolitical crime." It does not, as respondent and amici advocate here, simply interject additional, extra-statutory considerations that (as respondent concedes, Br. 38) have no bearing on the meaning of Congress's chosen factors. The other instances of "balancing" cited by respondent (Br. 40 n.31) and LCHR (Br. 20) involved the weighing of factors in deciding whether to grant discretionary relief, and thus are even further afield from the application of the mandatory exception at issue here.

Respondent now agrees. He makes no effort to justify the risk-of-persecution factor as an interpretation of Section 1253(h)(2)(C). To the contrary, he concedes (Br. 38) that "[i]t is not that the seriousness of the crime varies with the likelihood or the degree of persecution. Nor does a past act become more or less political when future risk is considered." Instead, respondent and his amici argue (Resp. Br. 29-39; UNHCR Br. 16-24; LCHR Br. 3-22) that the risk of persecution must be balanced as an extra-statutory factor in order to conform United States law to the Protocol and its incorporated Convention provisions. But again, respondent and his amici do not contend that the risk-of-persecution factor has any "anchor[] in the text" (*Shannon* v. *United States*, 512 U.S. 573, 583 (1994)) of the Protocol or Convention.[6] Nor could they, because the Convention flatly denies refugee status to "any person with respect to whom there are serious reasons for considering that * * * he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Protocol art. 1(2), 19 U.S.T. at 6225; Convention art. 1(F)(b), 19 U.S.T. at 6261.[7]

Nor does the negotiating history of the Convention document a consensus that the Convention bound signatories to apply such a balancing test. Respondent and his amici rely (Resp. Br. 36 & n.26; UNHCR Br. 19; LCHR Br. 18 & n.15) on the statement of Conference President Larsen that, "[w]hen a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the

[6] See also *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 65 (1993) (interpretation of treaty language "must begin, as always, with the text of the Convention[]"); see also *El Al Israel Airlines*, 119 S. Ct. at 671.

[7] As respondent conceded below (C.A. Br. 17-18), the Protocol is not a self-executing treaty. It thus does not confer any rights beyond those granted by the implementing domestic legislation. See Gov't Br. 27.

extent to which his fear of persecution was well founded." *Summary Record of the Twenty-ninth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 23, U.N. Doc. A/Conf.2/SR.29 (July 19, 1951). That comment offers scant support for respondent's position. First, it was made in the course of describing the practice of some nations under previous international instruments, which is why it was worded in the past tense. See *ibid.* The statement thus did not purport to be an interpretation of any mandate to be included in the text of the Convention itself. Indeed, the president's next sentence "simply ask[ed]" representatives to "keep in mind" the hypothetical case of a minor official of an outlawed political party who had a criminal record, noting his belief that countries had always dealt with such cases "fairly" under earlier agreements. *Ibid.*

Second, the comment quoted above does not specifically mandate ad hoc, individualized balancing; it suggests only that the "country of refuge" strike a balance. See also *Summary Record of the Twenty-fourth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 13, U.N. Doc. A/Conf.2/SR.24 (July 17, 1951) (statement of Mr. Larsen as delegate of Denmark) ("A proper balance must be struck between all the considerations involved.") (cited in LCHR Br. 18-19 n.15). As explained in our opening brief (at 29-30), Congress, after weighing the relevant considerations, struck what it deemed to be the appropriate balance in the text of Section 1253(h), which adopts a categorical approach with respect to all aliens who are believed to have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniorm weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and must be measured against the seriousness of particular past criminal conduct. In any event, the two remarks by a single delegate, upon which respondent and his amici rely, hardly constitute a "shared expectation[] of the contracting parties"

that could bind signatory nations. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223 (1996); see also G. S. Goodwin-Gill, *The Refugee in International Law* 102 n.126 (2d ed. 1996) ("The summary records [of the Convention] reveal shared concerns, but little consensus" on the serious nonpolitical crime provision.). That is especially so since respondent and his amici cite nothing—and there is nothing—in the text of the Convention itself that could reasonably be thought to impose such a requirement.

2. Respondent and his amici resort to the "overall object" and "purposes" of the Convention (Resp. Br. 29; LCHR Br. 19; UNHCR Br. 7-10). But again, they do so not to assist in the interpretation of ambiguous Convention terms, but rather to read into the Convention (and, derivatively, United States law) a mandatory, non-textual limitation on the expressly reserved sovereign power to exclude persons who are believed to have committed serious nonpolitical crimes. Even if we assume, for the moment, that such an approach is a valid means of treaty interpretation (cf. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991) (aids to treaty construction other than plain language "may be brought to bear *on difficult or ambiguous passages*") (emphasis added; citation omitted)), the argument is without merit.

Respondent claims (Br. 32) that the Convention's serious nonpolitical crime exception has two purposes: to protect the internal security of the country in which refuge is sought and to decline protection for persons who are fugitives from justice. The exception's purposes are not so limited, as we explain below. See pp. 9-12, *infra*. But even if they were, respondent fails to explain how rebalancing the risk of persecution advances either of those purposes. The persecution risk an alien would face upon return has no logical bearing on the threat to public order or safety that person might pose to the country of refuge. Nor does it contribute measurably to an effort to distinguish between fugitives from justice and refugees. The essential attributes of refugees are identified both under the Convention and United States law by the initial requirement that the alien demonstrate a well-founded fear of persecution (see Convention art. 1(A)(2), 19 U.S.T. at 6261; 8 U.S.C. 1253(h)(1)).[8]

Further, respondent's identification of the serious nonpolitical crime exception's purposes is incomplete. Internal security and public order were not the animating purposes of that exception. Both the Convention and United States law specifically address those concerns elsewhere. See Convention art. 33(2), 19 U.S.T. at 6276 (*non-refoulement* "may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who * * * constitutes a danger to the community of that country"); 8 U.S.C. 1253(h)(2)(B) (exception for alien who "constitutes a danger to the community of the United States").[9]

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[8] Amicus LCHR invokes what it characterizes as the Convention's overall purpose of protecting "persons facing persecution in their countries." Br. 8, 19. But the Convention does not protect all "persons" facing persecution; it protects only those who meet its definition of "refugee," which in turn excludes persons who have committed serious nonpolitical crimes. Thus, LCHR's argument simply begs the question presented in this case. Furthermore, in appropriate cases, amici LCHR's and UNHCR's concern (LCHR Br. 20-21; UNHCR Br. 18) that aliens not be returned to face severe persecution, such as certain death or torture, could be addressed through a grant of asylum (for cases such as this one that arose prior to IIRIRA) or an exercise of the Attorney General's prosecutorial discretion to defer action or stay removal. In addition, the United States is a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, modified Mar. 1985, 24 I.L.M. 535 (see 136 Cong. Rec. S17,486-S17,492 (daily ed. Oct. 27, 1990); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822), and thus will not return any peson covered by that agreement to a country where he would likely be tortured.

[9] Amicus UNHCR's claim (Br. 18 & n.20, 19) that "delegate after delegate" expressed the view that an "intractable refugee" should not be returned to "certain death" overlooks that those comments were made

The language and negotiating history of the Convention also demonstrate that the serious nonpolitical crime exception reaches beyond pure fugitives from justice. First, the language does not require a finding that the individual in fact committed a crime; it requires only that there be "serious reasons for considering" that a crime was committed.[10] Second, draft proposals suggesting that the exception to *refoulement* exclude "case[s] of prosecutions genuinely arising from non-political crimes" or "persons liable to extradition" for crimes were not adopted.[11] Third, limiting the exception

during the debates over Article 33's provision for expulsion of a "refugee" by the host country for crimes committed within that country. They did not address the serious nonpolitical crime exception to attaining refugee status in the first instance. See *Summary Record of the Fortieth Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 33, U.N. Doc. E/AC.32/SR.40 (Aug. 22, 1950) (the predecessor to Article 33's prohibition on return or expulsion of refugees applied only to a "genuine refugee * * * coming under the well-pondered definitions contained in article 1"); *Summary Record of the Twentieth Meeting*, Ad Hoc Comm. on Statelessness and Related Problems, 1st Sess., at 15-21, U.N. Doc. E/AC.32/SR.20, (Feb. 1, 1950). Moreover, the statements upon which amicus UNHCR relies are by no means unequivocal. Thus, the Chairman stated (*id.* at 15) that it was for the government concerned "to find some means of making reservations to meet special cases" of "intractable refugees," while accepting the "general principle" of not expelling refugees to territories where they would meet certain death. And the representative of the United Kingdom stated only that the "power" to expel any alien "would of course not be employed if it would endanger his life" (U.N. Doc. E/AC.32/SR.40, *supra*, at 31); he did not say that the Convention would divest the signatories of the power itself.

[10] See Convention art. 1(F), 19 U.S.T. at 6261; see also 8 U.S.C. 1253(h)(2)(C); N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents, and Interpretation* 67 n.60 (1953) (serious nonpolitical crime exception "refer[s] to persons who, in the *opinion* of the competent authorities of the state concerned, committed the crime or act").

[11] U.N. Doc. A/Conf.2/SR.24, *supra*, at 10-16; *Summary Record of the Thirty-third Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 8, U.N. Doc. E/AC.32/SR.33 (Aug. 14, 1950); see also Goodwin-Gill, *supra*, at 105.

to fugitives from justice would make the operation of the serious nonpolitical crime exception vary depending, not upon the conduct of the alien, but rather upon the prosecutorial resources and wherewithal of the country in which the crime occurred.

In addition, respondent ignores the fact that perhaps the most important purpose of the serious nonpolitical crime exception was to provide signatory nations a measure of flexibility and to equip them with a tool for sifting out those persons deemed undeserving of refugee status.[12] Recognizing both the sensitive nature of governmental decisions to afford safe haven to persons who have committed serious nonpolitical crimes in other countries and the wide variations in nations' criminal laws, moreover, the Convention drafters entrusted the delicate task of drawing lines and applying the Convention's terms to the individual States Parties.[13] Thus,

[12] See UNHCR Br. 7-10; U.N. Doc. E/AC.32/SR.33, *supra*, at 8 (exception "brought the Convention into accordance with the requirements of international morality and provided a safeguard for genuine refugees and for the receiving countries"); U.N. Doc. A/Conf.2/SR.24, *supra*, at 5 ("There were so many *bona fide* refugees that it was important not to allow any confusion between them and ordinary common-law criminals."); *id.* at 6 ("The real purpose of paragraph E [now F] of article 1 was to exclude from the scope of the Convention persons regarded as criminals, on the grounds that they should not be placed on an equal footing with *bona fide* refugees."); Goodwin-Gill, *supra*, at 95 & n.105 (Article 1(F)'s exclusions from refugee status describe persons "not deserving the benefit of refugee status," and each signatory State will determine the applicability of the serious nonpolitical crime exclusion "according to its own standards"); J. C. Hathaway, *The Law of Refugee Status* 214-215 (1991) (Article 1(F) exclusions allow signatory States to withhold protection from "undesirable refugees"); S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil Des Cours (Collected Courses of the Hague Academy of Int'l Law) 287, 298 (1977).

[13] See Gov't Br. 21-22, 29; P. Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 Brit. Y.B. Int'l L. 478, 480 (1954) ("The determination whether an individual is a refugee in the sense of Article I of the Convention and whether, therefore, the Convention is to be applied to him is clearly within the competence of the

contrary to the assertion of the UNHCR (Br. 16- 17), the fact that the United States does not balance the risk of future persecution against the seriousness of the past crime does not prevent other countries from doing so if they wish.[14]

C. The Board Reasonably Concluded That Respondent's Offenses Constituted "Serious Nonpolitical Crimes" Even Though They Were Not "Atrocious" In Character

Neither respondent nor his amici make any effort to defend the court of appeals' ruling that the Attorney General must consider whether an alien's crimes involved "acts of an atrocious nature" (Pet. App. 6a). Nor could they. See Gov't

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Contracting States."); Goodwin-Gill, *supra*, at 105; Hathaway, *supra*, at 214-215 ("[I]t falls to each contracting state to decide for itself when a refugee claimant is within the scope of an exclusion clause."). For this reason, the United States has long considered the guidelines from the UNHCR Handbook to be "just that—guidelines," which "may be accepted or rejected with respect to a signatory state's interpretation of the Convention." *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 26 n.5 (1981) (Office of Legal Counsel Memorandum).

[14] This flexibility is also manifest in the differing approaches of signatory nations to balancing the risk of persecution. The British House of Lords has specifically rejected the balancing test proposed here. *T* v. *Secretary of State for the Home Dep't*, 2 All England L. Rep. 865, 882 (House of Lords 1996) (Lord Mustill) ("[T]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned."); but see UNHCR Br. 21 n. 23 (citing French case applying the balancing test); *Malouf* v. *Canada*, 1995 1 Can. Fed. Ct. Rep. 537, 556-557 (Can. Fed. Ct. 1994) (adopting balancing test). Amicus UNHCR also cites (Br. 20) the Council of the European Union's *Joint Position on the Harmonized Application of the Term "Refugee,"* E.U. Doc. No. 96/196/JHA ¶ 13 (1996). That document, however, expressly provides that it "shall not bind the legislative authorities or affect the judicial authorities of the Member State[s]." *Id.* (preamble). Moreover, while the document proposes a "harmonized" approach by member States that would be consistent with the UNHCR's guidance, it does not suggest that the Convention mandates that approach.

Br. 33-38. Instead, they now argue that the serious nonpolitical crime exception must be confined to "very grave" offenses. Resp. Br. 38; LCHR Br. 9. This argument, however, suffers from the same fatal defects as the requirement that the crimes be "atrocious." "Serious" and "very grave" are not synonyms; had Congress intended to limit the exception to "very grave" crimes, it would have said so. See 5 U.S.C. 1212(g)(2)(B) (referring to "exceptionally grave" damage). Further, as explained in our opening brief (at 34-35), Section 1253(h)(2)(B) separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief, and further defines "particularly serious crime" to include an "aggravated felony," 8 U.S.C. 1253(h)(2). The cramped reading of "serious crimes" that respondent and amicus LCHR advance entails an upside-down construction of Section 1253(h), under which "serious" crimes would register as more depraved and violent than "particularly serious crimes."[15] In any event, the evidence is quite clear that respondent's crimes of arson and assault with weapons satisfy both the INA's and the Convention's terms.[16]

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[15] The Convention similarly distinguishes between "serious" and "particularly serious" crimes (Convention art. 33(2), 19 U.S.T. at 6276), and thus "serious nonpolitical crime" must be afforded a construction that does not render superfluous the reference to "particularly serious crimes" elsewhere in the Convention's text. Clearly, a crime that excludes an alien under Article 1(F)(b) does not have to be tantamount to a war crime or a crime against humanity, which are addressed by Article 1(F)(a) and (c). See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294-295 (1966) (rejecting such a construction as "too restrictive" and inconsistent with practice); Robinson, *supra*, at 69 n.67.

[16] See Gov't Br. 43 (citing authorities); Hathaway, *supra*, at 224 ("violence against persons" and arson); Goodwin-Gill, *supra*, at 107 (describing criteria proposed by UNHCR for screening Mariel Cuban asylum seekers in 1980) (arson, and assault accompanied by aggravating factors; use of weapons and injury to person suggest crime is "serious"); UNHCR Br. 14 n.16 (same). Respondent's argument (Br. 48) that his conduct did

Respondent, moreover, fails to come to grips with the Attorney General's position that the serious nonpolitical character of criminal conduct is influenced, not simply by its abstract gravity or Model Penal Code classification, but also by the identity of its victims. As explained in our opening brief (at 35-41), the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective and thus will likely constitute a serious nonpolitical crime. See also *In re Atta*, 706 F. Supp. 1032, 1039 (E.D.N.Y. 1989) ("[T]he United States does not regard the indiscriminate use of violence against civilians as a political offense."). That principle is consonant with longstanding judicial definitions of political activity, see Gov't Br. 35-36 (citing cases), with well-established principles of international law, *id.* at 36-37 (citing international instruments), and with the position of the UNHCR (Br. 26-29).[17] Respondent, for his part, cites absolutely no authority for the proposition that either United States law or the Convention and Protocol should be or were intended to be construed to protect persons who deliberately and repeatedly target innocent civilians for physical violence and property destruction.

D. The Board Reasonably Concluded That Respondent's Offenses Were "Serious Nonpolitical Crimes" Based On Their Nature And Character, Not Their Perceived Necessity Or Success

Respondent's defense (Br. 44-45) of the court of appeals' requirement that the Board factor in the necessity and

not constitute arson is mistaken. See *United States* v. *Bedonie*, 913 F.2d 782, 789-790 (10th Cir. 1990) (federal arson statute, 18 U.S.C. 81, applies to the burning of a motor vehicle), cert. denied, 501 U.S. 1253 (1991); *State* v. *Hage*, 532 N.W.2d 406, 412 (S.D. 1995) (burning of school bus is arson).

[17] Other than balancing the risk of persecution, the Attorney General's practice under the INA is largely consonant with the approach recommended by the UNHCR, as the UNHCR recognizes (Br. 24).

success of criminal conduct is notable for its brevity. Respondent makes no argument that the text of the INA, Convention, or Protocol, or their respective histories, compels consideration of those factors. Respondent argues (Br. 45) only that violence may sometimes be necessary. But it is difficult to imagine the circumstances under which deliberate and repeated violence against innocent civilian victims would be necessary or justifiable. In any event, alleged necessity does not make criminal conduct any more or less "serious." Nor does it by itself make the violence political. Rather, the Board has determined that it is the nexus between the criminal conduct and the protestor's objectives vis-a-vis the governing authority that endows the crime with a political character. And, as amicus UNHCR acknowledges (Br. 26-29), it has long been recognized that crimes targeting civilians and promoting general social disorder lack a sufficiently close nexus to qualify as political.[18]

Respondent is correct (Br. 46-47) that the cases we cite generally deal with violence against civilians in the context of what might be characterized as terrorist offenses. But nothing in the text of the INA or the relevant international agreements requires the Attorney General to disregard civilian violence unless it reaches the extreme level of terrorism. Indeed, it is eminently reasonable and consistent with principles of international law to conclude that unprovoked,

[18] See Gov't Br. 40 (citing cases); UNHCR Br. 26 ("[T]he link [to political conduct] is weakest when politically motivated acts are principally directed against private interests and is non-existent when those acts are intended to do nothing more than promote social chaos.") (internal quotation marks omitted); see also *Ahmad* v. *Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("We agree that an attack on a commercial bus carrying civilian passengers on a regular route is not a political offense. Political motivation does not convert every crime into a political offense.").

deliberate, repeated crimes against civilians will bear a heavy presumption that they are "nonpolitical."[19]

Requiring the Board to consider the success of criminal activity is even more counterintuitive. Under respondent's theory (Br. 44), repeated failures in accomplishing a political objective suggest that the underlying conduct was nonpolitical. But whether a protest action succeeds the first, fifth, or fiftieth time does not determine its essential political character. The lack of success may more readily be attributable to the level of oppression or the entrenchment of governmental officials.[20]

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[19] In any event, respondent (Br. 45) and amicus Massachusetts Law Reform Institute (MLRI) (Br. 6-25) exaggerate the "necessity" of violence against civilians to effect political change in Guatemala. Guatemala has enjoyed seven peaceful transfers of power between governments since 1985. AR 116; Dep't of State, *Country Reports on Human Rights Practices for 1997* 526-527, 533 (Joint Comm. Print 1998). Furthermore, shortly after respondent left Guatemala, an attempt by the then-President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See Gov't Br. 40 n.17. MLRI's brief also cites instances of peaceful resistance by students and others. Br. 12 (referring to protest marches and strikes), *id.* at App. 9, 23, 55, 122. MLRI's other "evidence" of the need for respondent to resort to violence against civilians is lacking in completeness. For example, MLRI identifies (Br. 13) as "[t]he Price of Student Protest" a 1980 incident in which the Guatemalan government supposedly attacked student protestors solely *"for reading* a list of grievances at a foreign embassy." While not to excuse the Guatemalan government's response, what MLRI neglects to inform the Court is that, in addition to "reading a list of grievances," the students, who were armed with revolvers, Molotov cocktails, and machetes, seized the embassy and took a number of hostages, including the Spanish ambassador. D. Stoll, *Rigoberta Menchu and the Story of All Poor Guatemalans* 79-86 (1999). MLRI also fails to cite any authority for many of its assertions, such as claims that passengers joined in the destruction of buses (Br. 5 n.5, 16), and that the military killed the head of respondent's party, the UCN (*id.* at 9; cf. *Country Reports*, *supra*, at 529 (noting charges filed against and conviction of gang members involved in UCN leader's death)).

[20] We have already disposed of respondent's alternative claim (Resp. Br. 17 n.7) that he is entitled to relief under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Div. C, Tit. IV-B, § 413(f), 110 Stat. 1269, amendments to the INA. See Gov't Br. 31-32 n.13.

E. Substantial Evidence Supports The Board's Determination That Respondent's Violence Constituted "Serious Nonpolitical Crimes"

As our opening brief details (at 41-46), substantial evidence supports the Board's determination that respondent's admitted, repeated acts of assault, arson, and vandalism targeted solely at innocent civilians constitute serious nonpolitical crimes.[21] Perhaps recognizing this, respondent seeks to amend rather than defend the record below. But his efforts to do so are too little too late.

First, respondent's attempted re-translation of his testimony is wrong. Respondent argues (Br. 11-12) that he never admitted to throwing stones at passengers, and that he said only that he "thr[e]w rocks at the buses" (Br. 12). As we explain in our reply brief at the petition stage (at 2)—an explanation that respondent still has not answered—the tape recording reveals that respondent referred to the object of his stoning by using the feminine direct object pronoun "la" (translated as "the," A. Gooch et al., *Cassell's Spanish-English, English-Spanish Dictionary* 385 (1978)). That "la" refers back to his use of the feminine noun "la gente" ("the people," *id.* at 332), and not to the masculine noun "el bus" ("the bus," *id.* at 80 (autobus)). Had respondent intended to refer to "el bus," he would have used the masculine direct object pronoun "lo" (*id.* at 396).[22]

Second, respondent's claim cannot be raised for the first time in this Court. This is "a court of review, not one of first

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[21] Indeed, MLRI's lengthy discussion (Br. 16-20) of bus burnings in Guatemala provides powerful evidence that respondent's conduct was predominantly economically motivated violence targeted at the actions of private bus owners.

[22] We lodged a copy of the tape recording of the administrative hearing with the Court at the petition stage.

view." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995). Section 1105a(a)(4) of Title 8 directs, moreover, that an alien's petition for judicial review of a final order of deportation "shall be determined solely upon the administrative record upon which the deportation order is based." See also *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[23]

Respondent, who was represented by the same attorney before the court of appeals, offers no sound excuse for his tardiness. Respondent's insistence (Br. 13-15) that the tape could not have been acquired earlier is pure surmise: he never asked. As soon as he did, the tape was promptly provided (*id.* at 15).[24] Nor was access to the tape necessary. In the brief it filed with the Board, the INS specifically relied upon the transcription of respondent's testimony stating that he stoned persons. AR 25. With or without a tape of the hearing, respondent himself surely knew whether that was an accurate account of his activities and his testimony, and at that time could have called any discrepancy to the Board's attention. But respondent declined to file either a brief before the Board or a motion to remand to the IJ. 8 C.F.R. 3.2(b) and (c)(4) (1998); *In re Coelho*, 20 I. & N. Dec. 464, 471 (BIA 1992). Furthermore, after the Board rendered its decision, which relied in significant part on the transcript showing that respondent had stoned and hit bus passengers

[23] Although Congress repealed Section 1105a in 1996, Congress reenacted that same provision as part of IIRIRA. See 8 U.S.C. 1252(b)(4)(A) (Supp. III 1997). Because respondent's deportation order was final before IIRIRA's enactment, 8 U.S.C. 1105a(a)(4) governs his case. See 8 U.S.C. 1252 note (Supp. III 1997).

[24] We are informed by the Executive Office for Immigration Review that, during proceedings before the IJ, the tapes are available for review from the clerk of the immigration court. Once an appeal to the Board is filed, the tape is sent to the Board for transcription and is available under the Freedom of Information Act, 5 U.S.C. 552. It may also be possible to obtain the tape through more informal methods, as occurred in this case.

(see Pet. App. 13a), respondent could have filed a motion to reopen or reconsider before the Board. 8 C.F.R. 3.2 (1996).[25] But he failed to do so. And before the court of appeals, respondent relied upon his testimony, Resp. C.A. Br. 24, 26, rather than challenge it. Respondent's failure to bring to the court of appeals' attention a claim of which he reasonably was (or should have been) aware far earlier counsels strongly against this Court granting a remand on that same basis. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); cf. 28 U.S.C. 2347(c) (providing for interlocutory remand by a court of appeals in which a petition for review is pending only if the party adduces additional "material" evidence and "there were reasonable grounds for failure to adduce the evidence before the agency") (rendered inapplicable to immigration petitions for review filed after October 31, 1996, see IIRIRA § 309(c)(4)(B), 110 Stat. 3009-626; 8 U.S.C. 1252(a)(1) (Supp. III 1997)) (discussed in Gov't Br. (at 46-47 & n.21) and Reply Br. (at 4) in *Reno* v. *American-Arab Anti-Discrimination Comm.*, No. 97-1252 (argued Nov. 4, 1997)).[26]

[25] Since July 1, 1996, a ninety-day time limit has been imposed on motions to reopen, unless the INS joins the motion. 8 C.F.R. 3.2(c)(2) and (c)(3)(iii) (1998); see also 61 Fed. Reg. 18,905 (1996); *id.* at 32,924.

[26] Respondent has also failed to exhaust his administrative remedies on this point. 8 U.S.C. 1105a(c) (1994) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations."); 8 U.S.C. 1252(d)(1) (Supp. III 1997); *Ravindran* v. *INS*, 976 F.2d 754, 762-763 (1st Cir. 1992) (claim of inadequate translation barred by failure to exhaust); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Respondent cites (Br. 15) as authority for a remand *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 351 U.S. 115 (1956). But there the new evidence that served as the basis for the remand "was not in existence when the proceedings were concluded before the" administrative agency. *Id.* at 125. Both *Willing* v. *Binenstock*, 302 U.S. 272 (1937), and *Panama Mail S.S. Co.* v. *Vargas*, 281 U.S. 670 (1930) (see Resp. Br. 16), were cases in which the record was devoid of facts pertaining to the relevant legal issue. Nor are any of the exceptional circumstances that occurred in *Wood*

Third, the translation errors respondent identifies, even if accurate and properly preserved, are immaterial. Even if we assume, *arguendo*, that hurtling rocks at a bus with glass windows that is loaded with innocent passengers is not itself serious criminal conduct, under respondent's own interpretation he still admits to tying up innocent civilians and beating them with sticks to force them to abandon the buses and stores he intended to burn and vandalize. See Resp. Br. App. 11-13. The alleged translation errors thus hardly obviate the serious nonpolitical character of his crimes.[27]

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1999

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v. *Georgia*, 450 U.S. 261 (1981), present here. Lastly, the power to grant, vacate, and remand under 28 U.S.C. 2106 should not be used simply to excuse a party's default or lack of due diligence. Respondent's invocation of "due process" (Br. 12-13) does not aid his claim, because the Board and the IJ were available to provide him fair process. See *Vargas* v. *United States Dep't of Immigration & Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987).

[27] Only a month before filing his answering brief in this Court, and nearly half a year after he first raised the translation issue in his brief in opposition, respondent filed a motion to remand with the Board. Resp. Br. App. 1-21. The INS has asked the Board to hold the motion in abeyance pending the Court's decision in this case. Also, for the Court's information, the Attorney General has exercised her discretion to stay temporarily the removal of most Guatemalan nationals (which would include respondent) in the wake of Hurricane Mitch's devastation. Unless extended, however, that stay will expire on March 8, 1999.

AMICUS CURIAE

BRIEF

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OCTOBER TERM, 1998

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v.
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Lawyers Committee for Human Rights offers this brief, with the consent of the parties, in support of the Respondent, Mr. Juan Anibal Aguirre-Aguirre.

Since 1978, the Lawyers Committee has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the

[1] No person or entity has made monetary contributions toward this brief, and no counsel for any party authored any portion of the brief. The Lawyers Committee for Human Rights files consents of counsel for the parties to file this brief together with this *amicus* brief.

standards affirmed in the International Bill of Human Rights. The Lawyers Committee has worked to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Its work is grounded in the international standards of the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and other international human rights instruments. The Lawyers Committee advocates adherence to these standards in U.S. law and policy.

With the assistance of volunteer lawyers, the Lawyers Committee operates the largest and most successful *pro bono* representation program for refugees in the country and provides legal representation, without charge, to hundreds of indigent refugees each year. The Lawyers Committee and its volunteer attorneys currently represent 900 clients from more than 70 countries, and in the past year have taken on more than 150 cases. Specific to the matter at issue in this case, the Lawyers Committee is currently conducting a 2 year study of the application of the exclusion clauses of the 1951 Convention and 1967 Protocol, both in the United States and in other countries. The Lawyers Committee believes that the resolution of this case may affect a significant number of applicants for asylum and withholding of deportation.

SUMMARY OF ARGUMENT

The Lawyers Committee for Human Rights does not condone the Respondent's acts of forcibly removing persons from buses, burning buses, and destroying property while engaged in political protest. However the issue in this case is not whether the Respondent's acts of political protest were right or wrong. The issue is whether the acts committed by the Respondent constitute "serious nonpolitical crimes," and so justify returning the Respondent to face persecution in his country.

There is no dispute that the Respondent would face persecution if returned to Guatemala. It is accepted that

he has received death threats as a student leader, and that other persons in his situation have been killed. It is also accepted that he committed the acts in question in the course of protesting violations of fundamental human rights, including deaths and disappearances. The consequences of denying the protection of withholding of deportation in such circumstances are extremely serious. Only the most exceptional of circumstances will justify a decision to deny that protection.

The United States has long granted protection to individuals facing persecution. When the United States became a party to the United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223,[2] that commitment to protecting individuals from persecution became an obligation under international law. In 1980, the U.S. enacted the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, bringing that obligation into U.S. domestic law. There are few exceptions to the general obligation to provide protection to persons facing persecution. This case requires a consideration of one: the "serious nonpolitical crime" exception.

The "serious nonpolitical crime" exception in Section 243(h)(2)(C) of the Immigration & Nationality Act, 8 U.S.C. § 1253(h)(2)(C) (1994),[3] derives from Article 1F(b) of the Protocol, and should be interpreted consistently with the Protocol. This was the express intention of Congress. Ordinary rules of statutory construction

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[2] By ratifying the Protocol in 1968, the United States took on the obligations set out in the United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259.

[3] Subsequent amendments introduced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III-A, Div. C, § 305, 110 Stat. 3009-602, codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996) do not apply to this case, as proceedings in this matter were initiated prior to April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625, 8 U.S.C. § 1101 note.

also requires that Section 243(h)(2)(C) be interpreted consistently with the Protocol. As the object and purpose of the Protocol is to protect persons from persecution, exceptions to the general obligation not to return a person to persecution must be construed narrowly. The Court of Appeals understood that the Section 243(h) provisions on withholding of deportation derived from the international obligations of the United States, and correctly relied on the Protocol to determine whether the Board of Immigration Appeals (BIA) erred as a matter of law in its interpretation of Section 243(h)(2)(C).

Reference to the Protocol, and to the sources that should be relied upon in interpreting it, confirms that the Court of Appeals correctly concluded that the BIA committed errors of law in finding that the Respondent's acts were "serious nonpolitical crimes" under Section 243(h)(2)(C).

First, an act must be very grave to qualify as a serious crime in the sense in which that term is used in section 243(h)(2)(C) and in Article 1F(b). Statements of the drafters, commentators, and the United Nations High Commissioner for Refugees (UNHCR) unanimously support this interpretation.

Second, where an act is committed for a political objective, it must be grossly disproportionate to that objective to be a serious *nonpolitical* crime. This test, set out in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986), requires an analysis of the applicant's political objectives and the political context in which the acts were committed. The Court of Appeals correctly held that the BIA was in error in determining, without addressing these issues, that the Respondent's acts were nonpolitical as a matter of law.

Third, a balancing of the severity of the crime committed against the prospective persecution faced upon return must be conducted before denying the Respondent

the protection of withholding of deportation. Unanimous support for this balancing test is found in the overall object and purpose of the Protocol, in statements of the drafters of the Convention, and in opinions of expert commentators. The balancing process provides the flexibility needed to realize the purpose of the Protocol. Without this, persons presumed to have committed a crime which, although serious, was not heinous in nature, would be returned to their country, even if they were certain to face torture or death at the hands of a repressive regime.

ARGUMENT

I. THE "WITHHOLDING OF DEPORTATION" PROVISIONS OF SECTION 243(h) MUST BE INTERPRETED IN ACCORDANCE WITH THE PROTOCOL.

The "withholding of deportation" provisions of Section 243(h)[4] must be interpreted in accordance with the Protocol as a matter of plain language, congressional intent, and the general requirement that statutes be construed to be consistent with international law.

First, Congress adopted the express language of the Protocol in enacting Section 243(h). Section 243(h)(1) incorporates Article 33(1) of the Protocol, which imposes an obligation on States not to return a person to

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[4] Section 243(h) provides:

> (1) The Attorney General shall not deport any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> (2) Paragraph (1) shall not apply if the Attorney General determines that . . .
>
> (C) there are serious reasons for considering that an alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.

persecution.[5] This requirement of "nonrefoulement" is a central obligation of the Protocol and the means by which the overall purpose of the Protocol—the protection of individuals facing persecution in their countries—is achieved. Section 243(h)(2)(C) mirrors Article 1F(b) of the Protocol which provides:

> "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . .
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

Second, it was Congress's express intention, in enacting the "withholding of deportation" provisions of Section 243(h), to conform U.S. law to the United States' obligations under the Protocol. Congress also intended that the section be interpreted consistently with the Protocol. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugees] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the . . . Protocol. . . . [T]here were . . . many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-7 (1987). *See also* Conf. Rep. No. 96-781, 20 (1979) ("The Conference adopts the House provision [setting out the four parts of Section 243(h)(2)] with the understanding that it is intended that [Section 243(h)(2)] be construed consistently with the Protocol.").

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[5] Article 33(1) provides:

> No contracting State shall expel or return ("refouler") a refugee in any manner whatsover to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Third, Section 243(h) should be interpreted consistently with the Protocol to accord with the rule that a domestic statute must, whenever possible, be construed to be consistent with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (the "Charming Betsy canon"). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-816 (1993) (Scalia, J. dissenting); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). This Court invoked this interpretive canon in construing the Protocol in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993). The BIA must also comply with this rule, as it applies to agency interpretations of the statutes for which they are responsible. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979).

What then is required for an interpretation of Section 243(h)(2)(C) to be consistent with the Protocol? First and foremost, an interpretation must accord with the object and purpose of the Protocol. "A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Art. 31(1), Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, 686.[6] An international treaty "should [be] construe[d] . . . to give effect to the purpose which animates it . . . . [W]here a provision of a treaty fairly admits of [two] constructions, one restricting, the other enlarging, rights which may be claimed under [the treaty], the . . . interpretation [which enlarges those rights] is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940) (citations omitted); *See also Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991).

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[6] Although the U.S. has not ratified the Vienna Convention, the State Department has stated that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice." Restatement (Third) of Foreign Relations Law Part III, introductory note, *citing* 1st S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) p. 1.

To accord with the object and purpose of the Protocol, the Section 243(h)(2)(C) exception to the general obligation to withhold deportation for those facing persecution must be interpreted narrowly. The object and purpose of the Protocol is to ensure the protection of persons facing persecution in their countries. In many cases, the consequences of denying an individual that protection will be severe: the return of an individual to a country where he or she has a clear probability of being killed, tortured or subject to other persecution. The Respondent faces such consequences if returned to Guatemala. Petitioner's Cert. Brief at App. 7. Accordingly, provisions for the exclusion of individuals from the protection of the Protocol should be interpreted and applied narrowly. *See* The United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,*[7] ¶ 149 (the UNHCR *Handbook*) ("considering the serious consequences of exclusion for the person concerned, . . . the interpretation of these exclusion clauses must be restrictive").[8] This approach recognizes that "[d]eportation is always a harsh measure [and] is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca,* 480 U.S. at 449.

[7] The UNHCR *Handbook* was issued for the guidance of Governments in determining refugee status, in response to a request by the Executive Committee of the High Commissioner's Programme at its twenty-eighth session. *Id.* at ¶¶ IV, VII.

[8] The member states of the European Union (EU) have agreed that "[i]n view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national law." Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee' of March 1996, ¶ 13, E.U. Doc. No. 96/196/JTA (1996). The Joint Position is a document setting out the shared understanding of EU countries of the minimum obligations imposed under Article 1 of the Convention and Protocol. As the Joint Position is an expression of the postratification understanding of 15 of the contracting parties to the Protocol, it may be relied upon as an aid to interpretation. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

Finally, interpretation of the statute should also abide by the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca,* 480 U.S. at 449; *INS v. Errico,* 385 U.S. 214, 225 (1966).

The Court of Appeals interpreted Section 243(h)(2)(C) in accordance with these rules of interpretation, and consistently with the Protocol. The court therefore gave effect to the intent of Congress, as it was required to do. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, n.9 (1984); *see also Cardoza-Fonseca,* 480 U.S. at 445-448. Its interpretation of Section 243(h)(2)(C) is correct as a matter of law.

II. AN ACT SHOULD BE CONSIDERED A SERIOUS NONPOLITICAL CRIME ONLY IF IT IS GRAVE AND GROSSLY OUT OF PROPORTION TO ANY POLITICAL OBJECTIVE.

To interpret Section 243(h)(2)(C) consistently with the Protocol requires the conclusion that an act will only fall within the serious nonpolitical crime provision if it is grave and, if committed for a political objective, grossly disproportionate to that objective.

A. An Act Must Be Very Grave to Qualify as a "Serious" Crime.

The question whether an act is a serious crime cannot be answered in the abstract. Rather, the proper question, in the context of Section 243(h)(2)(C), is whether the crime is sufficiently serious to justify returning the individual to face persecution.

When the question is phrased in this way, the answer must be that only a very grave act will constitute a "serious" crime under Article 1F(b), and therefore under Section 243(h)(2)(C). The UNHCR *Handbook* states:

> [A] 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b) even if technically referred to as 'crimes' in the penal law of the country concerned . . . . In evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances—must be taken into account.

¶¶ 155, 157.

The UNHCR *Handbook* is an important interpretative tool. As this Court has recognized, "the Handbook provides significant guidance in construing the Protocol to which Congress sought to conform . . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439, n.22 (relying upon the *Handbook*'s analysis of the Protocol to interpret the phrase "well-founded fear" despite noting that the *Handbook* did not have the force of law). Mr. Justice Blackmun, concurring in that case, made it clear that the UNHCR *Handbook* was an appropriate reference, and should play a significant part in the interpretation of the statute by the agency. *Id.* at 450-51.[9]

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[9] Moreover, the Department of Justice, of which the Petitioner is part, has noted the likelihood that Congress intended the set of standards enunciated in the Handbook to serve as an interpretive guide to the Refugee Act of 1980: 'We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.' *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service).

This Court has found the opinions of expert commentators to be persuasive in the interpretation of international treaties on numerous occasions, including in the interpretation of the Protocol. *See Sale*, 509 U.S. at 182; *Cardoza-Fonseca*, 480 U.S. at 432, 440; *see also El Al Israel Airlines, Ltd. v. Tseng*, No. 97-475, 1999 WL 7724, at *9 (U.S. Sup. Ct. Jan. 12, 1999); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 228 (relying on opinion of expert commentators on the Warsaw Convention governing international air transportation to determine meaning of that Convention). The opinion of expert commentators unanimously support the UNHCR Handbook's interpretation of the term "serious". *See* Guy S. Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996) ("Commentators and jurisprudence seem to agree . . . that serious crimes are those against physical integrity, life and liberty."); *accord* James C. Hathaway, *The Law of Refugee Status*, 224 (1991) (stressing "the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs"); Nehemiah Robinson, *Convention Relating To The Status Of Refugees: Its History, Contents And Interpretation*, 68 (1953) ("[Under Article 1F(b)] the person involved is assumed to be a common criminal. . . . [O]nly grave infractions (murder, theft, and like) would come under subsec. (b) while lesser crimes and administrative infractions (for instance traffic violations and the like) could not be regarded as a reason for exclusion.").

In light of this interpretation, the INS's suggestion that the term "serious" be interpreted to mean "causing distress, anxiety or inconvenience" is plainly incorrect. Petitioner's Brief on Merits at 35. Any trivial offence would meet this standard. Such a standard is clearly contrary to the Protocol, and, therefore, to the intent of Congress.

B. Where an Act Is Committed for a Political Objective, That Act Must Be Grossly Disproportionate to the Political Objective to Constitute a Serious *Nonpolitical* Crime as a Matter of Law.

The next question is: In what circumstances will an act committed for a political objective nevertheless be considered a *nonpolitical* crime?

The answer was provided in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Where an act is committed for a political purpose, that act must be grossly disproportionate to the political objective sought in order to constitute a serious *nonpolitical* crime. Reference to the Protocol indicates that this test is consistent with its language, object, and purpose. *Id.* at 596.

First, the Protocol does not require that all acts committed for political purposes be treated as political crimes. This would require States to extend the protection of the refugee regime to those who had committed truly heinous and atrocious crimes, such as the bombings, murders and torture in which McMullen and his organization were involved. *Id.* at 597. To extend protection to such persons is contrary to the object and purpose of the Protocol—the protection of persons from persecution. Therefore there must be a point beyond which the crime is rendered nonpolitical as a matter of law, regardless of motivation.

On the other hand, the plain language of the Protocol and the statute make it clear that the fact that a crime is serious cannot be sufficient to render it *ipso facto* nonpolitical as a matter of law. "The explicit exclusion of persons who have committed nonpolitical crimes implies that individuals who have been accused of or even committed serious *political* crimes may qualify as refugees." *Dwomoh v. Sava*, 696 F. Supp. 970, 978 (D.N.Y. 1988) (emphasis added). Therefore the U.S. would be in contravention of its obligations under the Protocol if it were to exclude a person who committed a crime for a political purpose merely because that crime was "serious." Some

higher standard must be required to "depoliticize" the crime as a matter of law.

The test provided by *McMullen* strikes the correct balance. In the words of the court in *McMullen*, "[a] balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense." *Id.* at 596, *referring to* Guy S. Goodwin-Gill, *The Refugee in International Law*, 61 (1st ed. 1983). It provides an appropriate test to ensure that the U.S. is not required to extend protection to persons whose acts are so disproportionate to the political objectives sought that the crime is not legitimately political in nature. At the same time the test is in keeping with the obligation of the U.S. under the Protocol and Section 243(h)(2)(C) to withhold deportation for those who have committed a crime which, although serious, is genuinely political in nature. The *McMullen* test accords with the UNHCR *Handbook*. *See* UNHCR *Handbook*, ¶ 152 [10]; *see also* Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996).

To summarize, where an individual commits a criminal act for a political purpose, there are three possible ways in which that act might be characterized. First, that act may not constitute a serious crime, in which case the

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[10] The full statement of the UNHCR *Handbook* on the issue is contained in ¶ 152:

> In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

prohibition does not apply. Second, that act may constitute a serious political crime, in which case the prohibition also does not apply. Third, that act may be of a magnitude and gravity that is grossly disproportionate to the individual's political motivation and objectives, and so more properly be characterized as a serious *non-political* crime as a matter of law. Only in this case does the prohibition apply.

The application of the *McMullen* test requires a consideration of the Respondent's political objectives in committing the acts, and the context in which those acts took place. The first step is to determine whether the relevant act "was committed out of genuine political motives or merely for personal reasons or gain." Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996); *concur* Hathaway, *supra*, at 174. There is no dispute that the Respondent had genuine political reasons for the acts he committed; the BIA accepted that the Respondent's acts were politically motivated.[11]

The next step is to examine the Respondent's political objectives. In this case the INS does not dispute that the Respondent's objectives included protesting, and seeking to bring an end to, the extrajudicial deaths and disappearances of Guatemalan citizens, including fellow students. These were unquestionably grave violations of fundamental human rights of concern to the populace as a whole. Moreover, despite previous protests and opposition, "[m]any human rights cases . . . remained unsolved, such as . . . the disappearance and murder of university

[11] The BIA accepted that the Respondent had an organizing role in the Estudeante Syndicado (ES), a student group, that he "engaged in demonstrations against the Guatemalan government," and that the "primary source of [the ES's] displeasure with government arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares." Petitioner's Cert. Brief at App. 13-17. There was clearly no personal motivation or gain. See Petitioner's Cert. Brief at App. 5.

students." *Dept. of State Country Reports on Human Rights Practices for 1991*, 613 (1992). *See also Dept. of State Country Reports on Human Rights Practices for 1989*, 599, 601-02 (1990) (discussing abductions and disappearances in 1989 of university students, six of whom were found dead); Lawyers Committe for Human Rights, *Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1900*, 93 (1991) ("[P]articular targets [were] university students, who continued to disappear and then reappear, murdered. Of five who disappeared within the first four months of 1990, three were later found on roadsides, victims of torture and murder."). On any assessment, the Respondent's political objectives were extremely valid and important ones. The Court of Appeals was correct in holding that the BIA's decision was erroneous as a matter of law in failing to consider and weigh these objectives in any meaningful manner. Petitioner's Cert. Brief at App. 5.

In applying the *McMullen* test, the decision maker must also take into account the political context in which the acts were committed. Those circumstances determine the avenues available for persons to express their political opinion. *Dwomoh*, 696 F.Supp. at 974-5, 979.[12] In many cases, applicants are seeking protection from persecution because they have expressed opposition to a government that does not permit the fundamental human right to peaceful expression of political opinion. In such cases, political expression necessarily takes on forms that would be considered inappropriate and unnecessary in a society in which freedom of political expression is respected and

[12] The court held that the BIA erred in not "considering the fact that in totalitarian governments a person may have only one chance to express or act upon anti-government views," and that "the only means of effecting political change" may be to engage in political acts which would be illegitimate in a democratic country. (Petitioner in the *Dwomoh* case was an activist who had participated in a coup to overthrow the dictatorship government in Ghana).

upheld. To deny protection to persons who engage in such forms of political expression is to deny protection to some of the persons who need it most, and to undermine the protection function of the Protocol and Section 243(h).

This country's history provides an example of the importance of reference to the political context in determining whether acts committed for political purposes are in fact genuinely political in nature. One of the earliest and most prominent incidents of political protest in the history of this country, the Boston Tea Party, is an example of political expression and protest through destruction of property. By contemporary U.S. standards, the commission of such acts to protest high levels of taxation would be clearly unacceptable. However to the protestors, denied any peaceful and effective means of political expression, this was the only means available to meaningfully express opposition to a policy of immense concern imposed by a despotic and unresponsive government. In that context, the acts committed were not grossly disproportionate to the political objectives that motivated them.

Finally the assessment must be made—were the acts grossly disproportionate to the political objectives? The Court of Appeals concluded that the BIA committed an error of law in not asking this question, as it was required to under *McMullen*. Petitioner's Cert. Brief at App. 4-6. The BIA decision discloses no analysis of the Respondent's political objectives. This subject is mentioned in one sentence of the BIA decision, which contains no analysis and no findings on the weight of those objectives.[13] Nor is there any consideration of the political context of Guatemala at that time. The Court of Appeals decision was correct.

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13 "The respondent testified that the primary source of their displeasure from the government [sic] arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares." Petitioner's Cert. Brief at App. 5.

A decision to return a person to face persecution for acts that were committed in the course of taking a stand against grave violations of human rights cannot be taken lightly. Where an individual carries out an act for political reasons, such act will only be *nonpolitical* as a matter of law if it is so serious that it is grossly out of proportion to the individual's political objectives. The application of any lesser standard is contrary to the Protocol, and therefore to Section 243(h)(2)(C).

III. APPLICATION OF THE SERIOUS NONPOLITICAL CRIME EXCEPTION REQUIRES A BALANCING OF THE SEVERITY OF THE CRIME AGAINST THE PERSECUTION FEARED ON RETURN.

Before an individual may be excluded from the protection of the Protocol under the "serious nonpolitical crime" exception, the severity of the crime must be balanced against the degree of persecution the applicant faces if returned to his or her country. This test recognizes that for some individuals, exclusion from the protection of withholding of deportation contained in Section 243(h)(1) will mean return to persecution that may be certain and extreme. Where the persecution feared is particularly severe, the crime must be exceptional in character to justify excluding an individual from protection. The test enables an individualized decision to be made, rather than the automatic application of an inflexible bar. In a sense, it is acknowledgement that the "punishment" of denial of protection will be far greater for some than for others, even where their crimes are objectively similar in seriousness.

The UNHCR *Handbook* states:

> In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime

> must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

¶ 156.

The Court of Appeals relied on the UNHCR *Handbook*'s statement in holding that the BIA committed an error of law as it "did not attempt to balance [the Respondent's] admitted offenses against the danger to him of death if returned to his native land." Petitioner's Cert. Brief at App. 7.

There is universal support for the balancing test in the overall object and purpose of the Protocol, the statements of the drafters of the Convention, and in the opinions of expert commentators.[14]

The drafters of the Convention clearly intended that a balancing process be applied in the application of Article 1F(b). The President of the Conference stated: "[w]hen a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded."[15] The statements of the drafters are an important basis for interpreting the Protocol, as this Court has recognized. *Sale*, 509 U.S. at 186.

[14] Each of these are sources which may properly be relied upon in interpreting a treaty. See Vienna Convention on Law of Treaties, Art. 31(1) (stating that a treaty must be interpreted "in light of its object and purpose"); *Air France v. Saks*, 470 U.S. 392, 396 (1985) (relying on statements of drafters in interpreting the Vienna Convention governing international air transportation); *Zicherman*, 516 U.S. at 228 (relying on fact that "expert commentators [were] virtually unanimous" in interpreting Vienna Convention governing international air transportation).

[15] Statement of the President of the Conference, Conference on Territorial Asylum, U.N. Doc. A/CONF.2SR.29, at 23, July 19, 1951, *as cited in* Hathaway, *supra* at 224, n.226. *See also* Statement of Mr. Larsen of Denmark, Conference on Territorial Asylum, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951, *Id.* at 225, n.227.

The fact that expert commentators are unanimous in their agreement on this point is also persuasive.[16] *See Zicherman*, 516 U.S. 217. Further, there is clear and significant State practice adopting the balancing test, as all 15 Member states of the E.U. have agreed that application of Article 1F(b) of the Protocol requires a balancing process. The Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee' of March 1996, ¶ 13.2, E.U. Doc. No. 96/196/JHA (1996).[17]

The balancing process also accords with the overall object and purpose of the Protocol: the protection of individuals from persecution. The balancing process provides a degree of flexibility, in accordance with Congress' intent that a flexible approach to withholding of deportation be taken to ensure the extension of protection to those requiring it. *Cardoza-Fonseca*, 480 U.S. at 449 ("In

[16] "[A] balance must . . . be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons." Goodwin-Gill, *The Refugee in International Law*, 106-107 (2d ed. 1996). *Accord* Hathaway, *supra* 224-5 ("[T]he risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the applicant to face prosecution or punishment . . . . [T]he decision-maker needs to consider the facts of the claim. If the gravity of harm feared by the applicant outweighs the significance of her criminal activity, she is not appropriately excluded under this clause."); Atle Grahl-Madsen, *The Status of Refugees in International Law*, 298 (1966).

[17] ¶ 13.2 provides "[In applying Article 1F(b)] [t]he severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected."

enacting the Refugee Act of 1980 Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.'" *citing* H.R. REP. No. 908, 96th Cong., 1st Sess. 9 (1979)). Without the flexibility provided by the balancing test, persons presumed to have committed a crime which, although serious, was not heinous in nature, would be returned, even if they were certain to face torture or death at the hands of a repressive regime.

Failure to adopt a balancing test also means that the petitioner may never have an opportunity to place before the decision maker evidence of the situation he or she would face if returned to his or her country. In a withholding of deportation matter, the decision maker could hold that the applicant was ineligible for withholding of deportation under Section 243(h)(2)(C) without first considering whether or not there was probable cause that the applicant faced a threat to life or freedom if returned to his or her country under Section 243(h)(1). Contrary to the INS's assertion that a balancing test would involve "counting the persecution factor twice," failure to balance means that in some cases evidence as to persecution will never be considered. Petitioner's Brief at 26.

The INS neglects to mention in its brief that the BIA has applied the balancing test in a number of instances. *See Matter of Rodriguez Palma,* 17 I. & N. Dec. 465 (BIA 1980) (applying a balancing process and determining that the applicant should be excluded); *Matter of Ballester-Garcia,* 17 I. & N. Dec. 592 (BIA 1980). *See also Matter of Pula,* 19 I. & N. Dec. 467, 474 (BIA 1987) (holding that balancing should apply when considering discretionary grant of asylum). The BIA's only statement rejecting the balancing test in relation to Section 243(h)(2)(C), in *Matter of Rodriguez-Coto,* 19 I. & N. Dec. 208 (BIA 1985), was dictum as the case did not involve interpretation of that section.

As Congress intended that Section 243(h)(2)(C) be interpreted consistently with the Protocol, the balancing test must be conducted before arriving at a decision under that section. The statutory format of Section 243(h) poses no barrier to an application of the balancing process. Interpretation and application of the phrase "serious nonpolitical crime" necessarily requires some exercise of judgment on the part of the decision maker. It is not only appropriate but necessary for the decision maker, in exercising that judgment, to take into account the consequences for the applicant on return in reaching a determination as to whether, in the circumstances, an act constitutes a serious nonpolitical crime.

The need to consider balancing factors in the application of bars to protection was articulated persuasively by a member of the BIA in the context of an asylum matter:

> If one accepts the proposition that the asylum process by its very nature is meant to provide refuge to persons whose lives or freedom are in danger, then it hardly seems advisable to provide a process which specifically permits an immigration judge or this Board to bar any evidence of the harm the applicant might face. *If for instance, an individual faced the possibility of death, or torture and inhuman treatment, would we not want to know this before deciding to deny asylum in discretion, even where the individual has committed a particularly serious offense?* [18]

Failure to apply the balancing test in a claim for withholding under Section 243(h)(2)(C) is contrary to the Protocol, as interpreted by reference to legitimate interpretative sources. A failure to balance is therefore con-

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[18] Member Heilman, concurring in *Matter of Gonzalez,* 19 I & N Dec. 682, 687 (BIA 1988) (emphasis added) (holding that even though Applicant had been convicted of particularly serious crime, full evidentiary hearing on the merits of the claim was necessary in order to determine if asylum should be granted in the exercise of discretion).

trary to the intention of Congress that Section 243(h)(2)(C) be interpreted consistently with the Protocol. Accordingly, the Court of Appeals decision that the BIA committed an error of law in failing to balance the Respondent's acts against the persecution he would face on return should be upheld.

CONCLUSION

For the reasons stated above and in the Respondent's brief, the Court should affirm the decision of the court below.

Respectfully submitted,

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